

McMartin (Migration) [2018] AATA 1902 (29 March 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mrs Crystal Hann V. McMartin
Master Castor Troy V. Zabala

CASE NUMBER: 1620774

DIBP REFERENCE(S): BCC2016/2758469

MEMBER: K. Chapman

DATE: 29 March 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations;
- cl.820.221(1) of Schedule 2 to the Regulations; and
- the second named applicant satisfies the requirements of cl.820.311 of Schedule 2 to the Regulations.

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Statement made on 29 March 2018 at
5:51pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – Applicant lost her right to participate in a hearing – Sufficient evidence of genuine and continuing relationship – Decision under review remitted

LEGISLATION

Migration Act 1958, s 5F, 65, 359, 360, 363A, 375A,
Migration Regulations 1994, r 1.15A, Schedule 2, cls 820.211, 801.221, 820.311

CASES

Jayasinghe v MIMA [2006] FCA 1700
Hasran v MIAC [2010] FCAFC 40

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 18 November 2016 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* ('the Act').
2. The first named applicant, Mrs Crystal Hann V. McMartin (hereafter 'the applicant') applied for the visa on 19 August 2016 on the basis of her relationship with the visa sponsor, Mr Bevan McMartin (hereafter 'the sponsor'). The second named applicant, Master Castor Troy V. Zabala, is the son of the applicant and is included in the visa application. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 ('the Regulations'). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a). Whilst satisfied the applicant was married to the sponsor at the time of the visa application, the delegate was not satisfied that they were in a genuine and continuing spousal relationship. On 6 December 2016, the applicant applied to the Tribunal for review of the visa refusal decision, providing a copy of that decision with her application. She also submitted documentation in support of the relationship including travel records, photographs, Statutory Declarations from third parties, personal statements, education records and a Queensland Marriage Certificate.
4. On 4 January 2018, the Tribunal wrote to the applicant pursuant to subsection 359(2) of the Act inviting her to provide further information in support of her claims that she and the sponsor are in a spouse or de facto relationship. The Tribunal is satisfied that this invitation was properly despatched to the applicant through her nominated representative, who is a registered migration agent. The applicant failed to provide the information within the prescribed time for responding to the invitation, which ended on 18 January 2018. No request for an extension of time to respond was made. The failure to respond in time to the invitation reflects poorly upon the applicant's representative.
5. Where an applicant is invited to provide further information in accordance with subsection 359(2) of the Act, and fails to do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the information according to subsection 359C(1) of the Act. In these circumstances, the applicant is not entitled to appear before the Tribunal in accordance with subsection 360(3) of the Act. Of note, the effect of section 363A of the Act is that if an applicant has no entitlement to a hearing, the Tribunal has no power to permit the applicant to appear before it as outlined in the Full Federal Court authority in the matter of *Hasran v MIAC* [2010] FCAFC 40. Accordingly, the applicant lost her right to participate in a hearing by the failure of her representative to respond in time to the invitation of 4 January 2018.
6. On 23 and 25 January 2018, however, the Tribunal received voluminous documentary evidence in support of the relationship between the applicant and the sponsor. This included taxation records, financial documentation, identity documents, receipts for consumer items, employment records, documentation with respect to vehicle ownership and registration, business records, travel documentation, copies of wills, utility accounts, photographs and social media records. The Tribunal observes this to be a matter where the applicant provided scant documentary evidence with her visa application to the Department of Immigration, then

provided more extensive evidence in conjunction with the review that was unavailable to the primary decision maker.

7. Given that the applicant lost her right to participate in a hearing, the Tribunal has very carefully considered the documentary evidence before it. Following extensive assessment, the Tribunal does not consider a hearing to be necessary in this matter, as it is able to find in favour of the visa applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act. Accordingly, for the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES AND LAW

8. There is a two stage process for Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. The issues in the present case are whether the applicant was at the time of the visa application, and remains at the time of the making of this decision, the spouse of the sponsor.

Whether the parties are in a spouse or de facto relationship

9. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, who is an Australian citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

CONSIDERATION OF CLAIMS AND EVIDENCE

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant enclosed with her visa application a marriage certificate indicating she married the sponsor on 13 August 2016 at Mooloolaba Beach in Queensland. On the evidence before the Tribunal, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

12. In assessing whether the applicant and sponsor have been in a spousal relationship, the Tribunal has considered the documentary evidence submitted with the primary application and the additional documentary evidence that was provided to the Tribunal. Having regard to the principles outlined in the decision of *Jayasinghe v MIMA* [2006] FCA 1700, when considering the circumstances of the relationship at the time of the visa application, the

Tribunal has had regard to later events as they tend logically to show the existence of prior facts. As previously noted, the applicant provided only scant documentary evidence to the Department with her visa application, however at the time of this decision more comprehensive documentary evidence was before the Tribunal.

13. Financial aspects of the relationship

14. The Departmental file contains limited documentary evidence concerning the financial aspects of the relationship at the time of application. However, the Tribunal notes that a utility account covering a period prior to the time of application was addressed to both the applicant and the sponsor at the same address where they presently reside. Further, numerous pieces of travel documentation, such as airline tickets and itineraries, point to the applicant and sponsor having conducted holidays together prior to the time of application. Such documentation is suggestive of the couple sharing expenses with respect to these holidays. The joint personal statement of the couple indicates that the sponsor was the primary financial provider at the time of application, as the applicant did not have work rights and was also unable to open an Australian bank account due to her visa status at that time.
15. The Tribunal notes that from shortly after the time of application, financial records display a pooling of financial resources into a joint bank account. Over time, the transactions on that account are commensurate with the daily activities of a spousal couple. Successive utility accounts covering the period from 25 May 2016 until late 2017 are addressed to the couple at their current address. Australian Taxation Office records indicate the couple registered together for business purposes in May 2017. It is apparent from financial records submitted to the Tribunal that the sponsor runs a farming endeavour, with the applicant assisting him and also working in paid employment as a carer. Queensland Transport documentation indicates the couple own a vehicle together. The applicant and sponsor made wills in favour of each other in September 2016. Property records from the Philippines confirm the applicant has an interest in real property in that country. The applicant's will provides that the sponsor takes a life estate in such property. Superannuation account statements also indicate the couple have made each other beneficiaries to their respective accounts. After careful consideration of the circumstances holistically, the Tribunal affords medium weight to the evidence in support of the financial aspects of the relationship.

16. Nature of the household

17. The documentary evidence contained in the Departmental file is limited with respect to the nature of the household at the time of application. However, as previously noted, a utility account records the couple to be living at the same address prior to the time of application. Third party statements, photographs, and personal statements of the couple are also suggestive of them cohabitating at that time. In particular, Statutory Declarations from the sponsor's parents point to their son and the applicant cohabitating at the family rural property from the time of application until the present time.
18. Significant documentary evidence for the period from the time of application is strongly suggestive of the applicant and the sponsor having resided together continuously since that time. Bank statements, identity documentation, taxation records, utility accounts, wills, vehicle registration documents, business records, consumer receipts and employment records consistently record the couple residing at the same address. Statutory Declarations from third parties and personal statements from the couple also point to them continuously cohabitating. It is also apparent from third party statements and educational records that the second named applicant resides with the couple. Having carefully considered all of the evidence, the Tribunal affords medium weight to the evidence in support of the nature of the household.

19. *Social Aspects of the Relationship*

20. The Tribunal has received more extensive documentary evidence regarding the social aspects of the relationship at the time of application than was available to the Departmental delegate. Social media records, photographs, third party Statutory Declarations, travel documentation, and personal statements from the couple indicate they met in person in the Philippines some years prior to the time of application. A variety of third party Statutory Declarations, including from members of the sponsor's family, point to the couple having commenced a relationship in 2014. Further, several family members of the sponsor attest to having met the applicant prior to the time of application. The photographic evidence before the Tribunal depicts the couple together with their respective family members both in the Philippines and Australia prior to the time of application.

21. An extensive suite of photographs, social media records and third party statements point to the couple presenting themselves to the wider world as spouses from the time they married. Wedding photographs indicate that a variety of guests attended the nuptials of the couple. These included members of the applicant's family and the second named applicant. It is apparent from the photographic evidence that the applicant, second named applicant and the sponsor have engaged in social activities as a family unit. Statutory Declarations from third parties indicate this to be the case. After careful consideration, the Tribunal places medium weight upon the evidence in support of the social aspects of the relationship.

22. *Nature of the persons' commitment to each other*

23. The documentary evidence previously described indicates that the applicant and the sponsor knew each other for at least five years prior to commencing their relationship in 2014. The sponsor has travelled to the Philippines and met members of the applicant's family. The applicant currently lives with the sponsor at the property owned by his family in Queensland. Social media records indicate that the applicant and sponsor remained in regular contact when geographically separated. Personal statements of the couple and third party Statutory Declarations indicate the applicant relinquished employment as an international flight attendant to pursue her relationship with the sponsor and cohabit with him in Australia. Third party statements and photographs also indicate that the applicant and the sponsor provide joint care to the second named applicant who resides with them. The personal statements of the couple point to them deriving a significant degree of companionship and emotional support from each other and viewing their spousal relationship as long term.

24. The Tribunal notes that adverse material by way of a single 'dob in' is contained in the Departmental file and is under cover of a Certificate pursuant to s.375A of the Act dated 15 September 2017. That material is in contrast to the significant documentary evidence suggestive of the relationship between the applicant and the sponsor being a genuine spousal relationship since before the time of application. Following careful consideration, the Tribunal prefers the significant documentary evidence in support of the spousal relationship of the couple being genuine, to the adverse singular 'dob in' to which it affords no weight. It is apparent to the Tribunal from the documentary evidence that the applicant and sponsor are in a genuine spousal relationship and, together with the second named applicant, that they have formed a bona fide family unit. After careful consideration, the Tribunal affords medium weight to the evidence in support of the nature of the persons' commitment to each other.

25. **CONCLUSION**

26. Having regard to the matters above, the Tribunal is satisfied that Mrs McMartin and Mr McMartin are validly married, have had, and continue to have, a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship

between them has been and remains genuine and continuing. The Tribunal is also satisfied that they have lived together since their marriage. The Tribunal is therefore satisfied that the requirements of s.5F(2)(a)-(d) of the Act were met at the time of the visa application and continue to be met at the time of this decision.

27. Given these findings the Tribunal is satisfied that at the time the visa application was made, and at the time of this decision, Mrs McMartin and Mr McMartin were in a spousal relationship as defined in the Act. The Tribunal is also satisfied that Mr McMartin was aged over 18 years when he sponsored Mrs McMartin, and further that he is not prohibited from being a sponsoring partner. Therefore the Tribunal finds that Mrs McMartin meets the requirements of clauses 820.211(2) and 820.221(1). The Tribunal is also satisfied on the documentary evidence that Master Zabala, the second named applicant, was a dependent child of his mother at the time of the visa application, that he was validly sponsored for the visa by Mr McMartin at that time and that both of these matters remains so at the time of this decision.
28. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

29. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations;
 - cl.820.221(1) of Schedule 2 to the Regulations; and
 - the second named applicant satisfies the requirements of cl.820.311 of Schedule 2 to the Regulations.

K. Chapman
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).